KERAJAAN MALAYSIA (KEMENTERIAN SUMBER ASLI DAN ALAM SEKITAR) v. KUMPULAN SAKATA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
LEE SWEE SENG J
[ORIGINATING SUMMONS NO: 24C(ARB)-44-12-2015]
9 MAY 2016

ARBITRATION: *Award – Interest – Whether arbitrator had jurisdiction to award pre-award interest – Whether arbitrator erred in awarding pre and post award interest – Whether arbitrator committed error of law in awarding final award – Whether court bound by decision of Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal*

Arising out of a contractual dispute, the plaintiff (respondent) applied to the present court pursuant to s. 42 Arbitration Act 2005 (Act) for determination of a question of law arising out of a final award of an arbitrator. In the final award, the arbitrator awarded the defendant (claimant) a simple interest of 8% per annum on the awarded amounts, to be computed from the date of commencement of arbitration until the date of full realisation. The plaintiff submitted that the present court was bound by the decision of the Court of Appeal in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal* which held that the Act did not confer on an arbitrator the power to award pre-award interest. The question of law that arose, *inter alia*, was whether the arbitrator had jurisdiction in law to allow pre-award interest on the amount awarded from date of commencement of the arbitration.

Held (setting aside pre-award interest):

(1) The position of the law on pre-award interest as may be awarded by an arbitrator is as propounded authoritatively by the Court of Appeal in the *Far East Holdings* case. To put it pointedly and plainly, an arbitrator has no jurisdiction to award pre-award interest but only post-award interest if provided for in the arbitration agreement. It is very much the *ratio* of the case where pre-award interest is concerned being the answer to a specific question raised in a reference under s. 42 of the Arbitration Act 2005 which substantially affects the rights of the parties to the arbitration. In the circumstances, the present court was bound by the doctrine of *stare decisis* and was constrained to vary the award by setting aside the pre-award interest. (paras 14, 27, 28 & 31)

Case(s) referred to:

Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd [1995] 1 SLR 548 ***(refd)***
Chandris v. Isbrandtsen-Moller Co Inc [1950] 2 All ER 618 ***(refd)***
Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal [2015] 8 CLJ 58 CA ***(refd)***
Leong Kum Whay v. QBE Insurance (M) Sdn Bhd [2006] 1 CLJ 1 CA ***(refd)***

A *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd [1994] 3 CLJ 338 HC* ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng [1995] 3 CLJ 520 CA ***(refd)***
Malayan Banking Bhd v. Chairman Sarawak Housing Developers' Association [2014] 6 CLJ 409 FC ***(refd)***
Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd [2006] 3 CLJ 177 FC ***(refd)***
B *Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA* ***(refd)***
Raja Lope & Anor v. Malayan Flour Mills Bhd [2000] 6 CLJ 194 HC ***(refd)***
Shamelin Holdings Sdn Bhd v. Mohd Anhar Ahmad [2006] 8 CLJ 622 HC ***(refd)***

Legislation referred to:
Arbitration Act 1952 (since repealed), s. 21
C Arbitration Act 2005, ss. 30(1), (5), 33(6), 42
Civil Law Act 1956, s. 11

Law Reform (Miscellaneous Provisions) Act 1934 [UK], s. 3

For the plaintiff - Neorazlim Saidil; SFC
For the defendant - Felix Dorairaj; M/s Dorairaj, Low & Teh
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Reported by Sandra Gabriel

JUDGMENT

Lee Swee Seng J:
E

[1] The plaintiff had applied by this originating summons to this court under s. 42 of the Arbitration Act 2005 for determination of a few questions of law arising out of a final award of an arbitrator. The final award was the outcome from a reference to arbitration by the parties of the differences and disputes arising out of a contract dated 16 February 2007. The plaintiff here
F is the respondent in the arbitration and the defendant here is the claimant. The project which was the subject matter of the contract was with respect to the defendant undertaking the design, construction and completion of the river upgrading works in relation to the Kerayong River for a length of 1.8 km from the mouth of the said river to the point of discharge of the
G SMART Project System, Federal Territory, Kuala Lumpur.

Prayer

[2] Four questions of law were referred to this court and for the purpose of the appeal filed by the defendant herein, only the fourth question would
H be relevant. That question of law posed is whether the arbitrator has jurisdiction in law to allow interest on the amount awarded as given in paras. 15.5 and 17.1(1) of the final award, which is from date of commencement of the arbitration and clarified on oral submission as "pre-award interest".

I **Principle**

[3] Section 33(6) of the Arbitration Act 2005 states as follows:

> Unless otherwise provided in the arbitration agreement, the arbitral tribunal may:

(a) award interest on any sum of money ordered to be paid by the award from the date of the award to the date of realisation; and

(b) determine the rate of interest.

[4] In the final award, the arbitrator had, in para. 15.1, awarded to the defendant a simple interest of 8% per annum for the awarded amounts in arbitration. This simple interest shall be computed as from 16 May 2012 (the date of commencement of arbitration) until the date of full realisation. The same wording appeared at para. 17.1(1) of the final award.

[5] As stated by the learned arbitrator at para. 15.1 of the award, the claimant in its amended statement of claim had prayed for interest on its claims at 8% per annum. The learned arbitrator proceeded to support his award of interest of 8% per annum as follows:

> 15.3 In this arbitration, the Claimant has produced its Audited Accounts for financial years 2006 to 2008 [B16/5111-5211]. The Audited Accounts show that the Claimant had overdraft facilities and incurred interest on overdraft amounts at interest rate of 1.5% to 2% above Base Lending Rate of Affin Bank Berhad. The bank statements in Bundle B16 also show that in years 2008, 2009 and 2010 there were substantial periods of time when the Claimant utilized overdraft of millions of ringgit and incurred bank interests on the overdraft amounts: see, for example, 2008 overdrafts exceeding RM5 million [B 16/5363, 5367, 5371- 5373; and 2010 overdrafts of about RM10 million [B 16/5375- 5378]. It is a notorious fact that banks charge interest on monthly rests.
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> 15.4 In the circumstances, I find that an interest rate of 8% per annum would be fair and appropriate by compensating the Claimant for the loss of use of money represented by the awarded amounts for this Project. This interest rate of 8% per annum should be on simple interest basis.
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> 15.5 In the premises, I award simple interest of 8% per annum for the awarded amounts in this arbitration. The interest shall be computed as from 16 May 2012 (the date of commencement of this arbitration) until the date of full realisation.

[6] Learned counsel for the defendant submitted that the question of law posed does not substantially affect the rights of the parties as the rights of the parties in respect of other parts of the final award are not affected. Thus it was argued that it cannot be said that an answer to this question would substantially affect the rights of the parties.

[7] With respect I do not agree. Had the arbitrator not granted interest in favour of the defendant, I am quite certain the defendant would be referring a question of law to the court under s. 42 of the Arbitration Act 2005. It is clearly a question that substantially affects the rights of the parties not just in terms of quantum, but also with respect to the very jurisdiction of the arbitrator in awarding interests, whether it be pre-award interest or post-award interest or both.

[8] Learned counsel for the plaintiff submitted that this court, being a High Court, is bound by the decision of the Court of Appeal in *Far East Holdings Bhd & Anor v. Majlis Ugama Islam dan Adat Resam Melayu Pahang & Another Appeal* [2015] 8 CLJ 58 at p. 89; [2015] 4 MLJ 766 at p. 798:

> [98] On the issue of interests, we agree with the learned judge that the Arbitrator has erred in law in awarding pre and post award interests. Having considered the Act, we find that under s. 33(6), the Act has made specific provision for post award interest, but does not provide for pre award interest. *Clearly the Act does not contemplate the awarding of pre award interest. We agree with the submissions by the learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre award interest, then implicitly the Legislature did not intend to confer on an arbitrator the power to award pre award interest*. Therefore we agree with the learned judge that the award of pre award interest ought to be set aside. (emphasis added)

[9] The question referred to the High Court in the *Far East Holdings*' case was reproduced by the Court of Appeal as follows in para. 22:

> Whether the arbitrator could in law award pre-award interest and post-award interest when the defendant did not specifically plead for the same in the statement of claim and the plaintiffs object to such award?

[10] The Court of Appeal had set out the argument on interest before the arbitrator as follows at pp. 86-87 (CLJ); pp. 796-797 (MLJ):

> Interests
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> [87] The arbitrator was urged by learned counsel for MUIP to award interests, even though no interest was pleaded, on the ground that MUIP had been deprived of the extra dividends it would have received had it been permitted to exercise both options, and for the loss of dividends suffered by MUIP due to the additional allotment of 22,096,868 shares to FEH. It was also submitted that pre award interest could be awarded under s. 74(1) and (2) of the Contracts Act 1950. FEH and KAOP on the other hand had submitted that no interest should be awarded because MUIP had not pleaded for interest and the facts on the claim for interest were not pleaded. It was further submitted that based on s. 33(6) of the Act, the arbitrator has no power to award pre award interest. Additionally, FEH and KAOP contended interest is 'haram' in 'hukum syarak'.
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> [89] The arbitrator is of the view that his jurisdiction to award pre award interest is based on the common law position and s 11 of the Civil Law Act 1956 which confers a discretion on the court to award pre judgment interest. Section 11 of the Civil Law Act 1956 states as follows:
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> > Power of Courts to award interest on debts and damages.
> >
> > In any proceedings tried in any Court for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such

rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section:

(a) shall authorise the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonour of a bill of exchange.

[90] Having considered the case authorities and the submissions made, the arbitrator awarded MUIP pre award interest at 4% pa. Based on s. 33(6) of the Act, the arbitrator awarded post award interest also at 4% pa.

[11] With respect to post-award interest, the Court of Appeal affirmed the decision of the High Court in setting aside the post-award interest on ground that it was not pleaded as can be seen below:

[99] With regard to post award interest, it is not disputed that MUIP had not pleaded for such interest either in the statement of claim or in the originating summons filed at the High Court. We are of the view that in the absence of any prayer for interest, which learned counsel for MUIP must be taken to be aware of, the arbitrator ought not to have awarded post award interest. We agree with the submissions by learned counsel for FEH and KAOP that parties must be bound by their pleadings. The learned judge is correct in setting aside the post award interest.

[12] Clearly if post-award interest had been pleaded, the High Court and the Court of Appeal would have no issue affirming its award as s. 33(6) of the Arbitration Act 2005 provides for it, unless the arbitration agreement provided otherwise, which was not so contended there.

[13] However, on the point of pre-award interest, the Court of Appeal did not decide on the point of pleading, or rather the absence of it. Instead, the Court of Appeal dealt with the issue of the jurisdiction of the arbitrator to grant pre-award interest. In other words, even if there had been pleaded pre-award interest, the arbitrator could not have granted it. The reasoning of the Court of Appeal is as follows at p. 89 (CLJ); pp. 788-789 (MLJ):

[98] On the issue of interests, we agree with the learned judge that the Arbitrator has erred in law in awarding pre and post award interests. Having considered the Act, *we find that under s. 33(6), the Act has made specific provision for post award interest, but does not provide for pre award interest. Clearly the Act does not contemplate the awarding of pre award interest. We agree with the submissions by learned counsel for FEH and KAOP that when the Act specifically provides for post award interest but is silent on pre award interest, then implicitly the Legislature did not intend to confer on an arbitrator the power to award pre award interest*. Therefore we agree with the learned judge that the award of pre award interest ought to be set aside. (emphasis added)

[14] As the basis for the Court of Appeal holding that the arbitrator ought not to have awarded pre-award interest stems from a lack of power of the arbitrator to do so in law, it could hardly be said that the said decision is a mere *obiter dicta*. It is very much the *ratio* of the case where pre-award interest is concerned, being the answer to a specific question raised in a reference under s. 42 of the Arbitration Act 2005 which substantially affects the rights of the parties to the arbitration.

[15] This court can appreciate the various arguments that may be raised in favour of upholding an award of pre-award interest. It may be argued that the repealed Arbitration Act 1952 under its s. 21 had a substantially similar clause on interesting awards as follows:

> Interest on awards
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> A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award at the same rate as a judgment debt.

[16] Whilst nothing is said with respect to pre-award interest under the repealed Arbitration Act 1952, courts have consistently held that pre-interest may be awarded and resort was made to s. 11 of the Civil Law Act 1956 where the power of an arbitral tribunal to award pre-award interest is concerned. It must not be overlooked that under s. 30(1) and (5) of the Arbitration Act 2005, an arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia and shall take into account the usages of the trade applicable to the transaction:

> 30 Law Applicable to Substance of Dispute
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> (1) Unless otherwise agreed by the parties, in respect of a domestic arbitration where the seat of arbitration is in Malaysia, **the arbitral tribunal shall decide the dispute in accordance with the substantive law of Malaysia**.
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> ...
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> (5) The arbitral tribunal shall, in all cases, decide in accordance with the terms of the agreement and **shall take into account the usages of the trade applicable to the transaction**. (emphasis added)

[17] It cannot be gainsaid that our courts have consistently held under the repealed Arbitration Act 1952 that s. 11 of the Civil Law Act 1956 empowers an arbitral tribunal to grant pre-award interest, being the governing substantive law where arbitration is concerned. The Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1 confirmed that an arbitrator has the power to award pre-award interest:

> [32] In the first place it is well settled that an arbitrator, in the absence of a specific clause in the agreement, has power to award interest (see *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 2 MLJ 51; *Executive Engineer v. DN Senapati* AIR 1980 Orissa 74) ...

[18] It may also be argued that just as under the repealed Arbitration Act 1952, the present Arbitration Act 2005 does not prohibit the award of pre-award interest. Hence in the absence of any specific prohibition under the Act and the contract, an arbitral tribunal, deriving its powers from the contractual submission to it, must necessarily have the implied power to award interest. The arbitral tribunal derives its power to adjudicate a dispute not from the Arbitration Act 2005 but from the arbitration agreement of the parties.

[19] Such is the position in England in the English Court of Appeal in *Chandris v. Isbrandtsen-Moller Co Inc* [1950] 2 All ER 618 where one of the questions before the Court of Appeal was whether or not interest could be awarded by an arbitrator on the amount awarded for demurrage. The English Court of Appeal underscored the fact that an arbitrator's power to award interest was derived from the submission to him which clothed him with the power to decide "all matters in difference" according to the existing law of contract, exercising every right and discretionary remedy given to a court of law: ie, s. 3 of the Law Reform (Miscellaneous Provisions) Act 1934 (our s. 11 of the Civil Law Act 1956). Indeed there is a sense of *déjà vu* as one considers the arguments raised by learned counsel there. His Lordship Tucker LJ in the English Court of Appeal case held at pp. 621-623 as follows:

> The argument for the claimant is that just as in 1851 the arbitrator derived his power to give interest directly, not from the Act of 1833, but from a submission to him of all matters in dispute, so, now, in 1950, the arbitrator does not derive his jurisdiction to give interest from the Act of 1934, but from the submission to him of the disputes, which involves that he has to deal with those disputes according to the law of the land and that he is clothed with authority to give to the claimant such rights and remedies as would have been available to him in a court of law having jurisdiction to deal with the same subject-matter. Counsel submits that, applying the reasoning of Sir John Jervis CJ in *Edwards v. Great Western Ry Co* to the statute of 1934, in which we find a court of record substituted for a jury, the same result should follow, *viz* that, by reason of the submission, the arbitrator has been clothed with authority to deal with this matter in the same way as that in which it could have been dealt with by a court of record. The argument for the charterers is that one must now look only at s. 3(1) of the Act of 1934 to determine what the powers of the arbitrator are, and that that sub-section in terms merely gives a discretionary power to courts of record with regard to any proceedings tried in such a court. The Act of 1934, it is urged, is silent regarding arbitrations, and, therefore, it must be taken to have been intended that its provisions should not apply to arbitrations. Counsel drew our attention to the fact that in the Arbitration Act, 1934, which had been passed two months earlier, there was a special provision under s. 11 providing for interest to be allowed on awards. That section provides:
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> > A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Counsel further points out that the Arbitration Act, 1934, makes no provision for the awarding of interest by the arbitrator as distinct from the interest given under s 11, which only runs from the date of the award. Furthermore, says counsel, the policy of the legislature in this matter can be ascertained by seeing what has been done in subsequent Acts, and he quotes the Evidence Act, 1938, the Limitation Act, 1939, the Law Reform (Frustrated Contracts) Act, 1943, and the Law Reform (Contributory Negligence) Act, 1945, in all of which special provision has been made in terms, including the case of arbitrations, and, says counsel, that shows that the legislature, when it intends to give powers to an arbitrator, does so in terms.

With regard to that argument, I do not think it is strictly permissible to interpret a statute by reference to what has been done in subsequent statutes, but, however that may be, I think the history of this matter shows that up till 1938, or thereabouts, there had been a considerable difference of judicial opinion as to the power of an arbitrator in the absence of express provision to deal with certain defences which are expressly available as answers to actions, and the position with regard to those matters was dealt with by the House of Lords in *Naamlooze Vennootschap Handels-en-Transport Maatschappij "Vulcaan" v. A/S J Ludwig Mowinckels Rederi*. There, Lord Maugham LC said ([1938] 2 All ER 155):

> The matter does not rest there, because we have to consider how far the suggested elimination of defences available at law or in equity must logically be held to extend in other arbitrations. If the party defending may not rely on the Statute of Limitations, can he rely on the Statute of Frauds, or the Act partially replacing it? Could he rely in a commercial arbitration on the Gaming Act? A number of like questions might be asked. It is true, and this is the main point on which the appellants rely, that the Limitation Act, 1623, s. 3, was in terms limited to actions. It may be noted that no such statute passed before the Real Property Limitation Act, 1833, expressly bound courts of equity. There is, however, no doubt that long before the Judicature Act, 1873, where a court of equity had to adjudicate on the validity of a debt in a suit to administer an estate, or in any like suit, it held itself bound to apply the statutes of limitations in precisely the same way as if there were an action at law to recover the debt … It is indisputable that, in modern arbitration, the principles of equity must be applied just as they would now be applied in a court of law, since upon a Special Case for the opinion of the court under s. 7 of the Arbitration Act or the Judicature Act, 1925, s. 94 (replacing s. 19 of the Arbitration Act), the court is, and has long been, bound to apply equitable rules and relief. It is difficult to see how the equitable view of the applicability of the Limitation Act, 1623, to a case of debt can be excluded in a legal arbitration … The authorities on the question as to whether the statutes of limitation are available in an arbitration have been carefully considered by my noble and learned friend LORD WRIGHT, presiding in the Court of Appeal, and it is not necessary to repeat them. The hesitation or the doubts expressed by SCRUTTON, LJ, in *Board of Trade v. Cayzer, Irvine & Co*. appear to be mainly directed against the

> laying down of an absolute and general rule applicable in all kinds of arbitration. At least, that is how I understand them, and, if I may say so with all respect, to that extent I agree with them. The remarks of VISCOUNT CAVE, L.C., in the same case, when the matter came before this House, certainly tend to show that, in his view, in commercial arbitrations an arbitrator is bound to give effect to all legal defences, including a defence under any statute of limitation. On a careful consideration of all the cases, I am content to say that I agree with what was said by LORD SALVESEN, delivering the judgment of the Board in *Ramdutt Ramkissendass v. ED Sassoon & Co* … In that case the Indian Limitation Act 1908 (the relevant period being three years), was taken for practical purposes to be the same as the Limitation Act, 1623, and LORD SALVESEN observed: 'Although the Limitation Act does not in terms apply to arbitrations, they [their Lordships of the Judicial Committee] think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every defence which would have been open in a court of law can be equally proponed for the arbitrator's decision unless the parties have agreed - which is not suggested here - to exclude that defence. Were it otherwise, a claim for breach of a contract containing a reference clause could be brought at any time, it might be twenty or thirty years after the cause of action had arisen …'

Counsel for the charterers says that a distinction is to be drawn between statutes which bar a remedy, such as the statutes of limitation, the Statute of Frauds, 1977, the Sale of Goods Act, 1893, and so forth, to all of which statutes an arbitrator is bound to give effect notwithstanding they afford defences to actions, and statutes which confer rights, and that in the latter cases the right so conferred is not to be extended beyond the plain words of the enacting statute.

I cannot see why any distinction should be drawn between the duty of an arbitrator to give effect to such statutes as the Statute of Limitations and his jurisdiction in his discretion to award of interest is only a part of the damages recoverable, and, adapting to the facts of this case the language of Lord Salvesen in the case to which I have just referred-language which was approved by Lord Maugham-it would read as follows: "Although the Law Reform (Miscellaneous Provisions) Act, 1934, does not in terms apply to arbitrations, I think that in mercantile references of the kind in question it is an implied term of the contract that the arbitrator must decide the dispute according to the existing law of contract, and that every right and discretionary remedy given to a court of law can be exercised by him". To that there are certain well-known exceptions, such as the right to grant an injunction, which stand on a different footing. One of the reasons why an arbitrator cannot give an injunction is that he has no power to enforce it, but such an objection does not apply to an award of interest.

A This matter was dealt with fully by Lord Goddard CJ in delivering judgment of the court in the *Podar* case. He dealt with the power to give interest at common law and under the Civil Procedure Act, 1833, and he then proceeded to say ([1949] 2 All ER 67):

> The case which would seem to be directly in point is *Edwards v. Great Western Ry Co* … In that case the court approved of the allowance of interest by an arbitrator because it was allowable in the circumstances of that case by the provisions of the Civil Procedure Act, 1833. Accordingly, we think we must take it to be the law that before the Law Reform (Miscellaneous Provisions) Act, 1934, an arbitrator had the same powers as the court with regard to the award of interest, but no greater power.

The Lord Chief Justice then goes on to deal with the Law Reform (Miscellaneous Provisions) Act, 1934, and he says (*ibid*):

> Moreover, as s. 28 and s. 29 of the Civil Procedure Act are repealed, we feel driven to hold that not only have arbitrators no power to give interest on damages, but they have been deprived of the powers which they had so long as the sections of the Civil Procedure Act were in force and can now only give it in circumstances in which it was recoverable at common law.

Counsel for the charterers argued that that judgment was based on the assumption that it was the Civil Procedure Act, 1833, which gave the arbitrator his power to award interest, and that, once that Act was repealed, all such powers had gone, and, unless the arbitrator had been given fresh powers, he had none. I think, however, that *the real basis of Edwards v. Great Western Ry Co was that the arbitrator derived his powers, not from the Act of 1833, but from the submission to him which necessarily gave him the "implied powers" referred to in the language of Lord Salvesen which I have just quoted, and I see no reason why, since the Act of 1934, an arbitrator should not be deemed impliedly to have the same powers. Therefore, with diffidence, having regard to the view expressed by the Divisional Court on this matter, I have come to the conclusion that in such a case as the present the arbitrator has power to award interest,* and, accordingly, to that extent, I think this appeal should succeed and the *Podar* case (*Podar Trading Co Ltd, Bombay v. Fracois Tagher, Barcelona* [1942] 2 All ER 62) be overruled. (emphasis added)

[20] The *Chandris* reasoning was applied in the Malaysian context in *Lian Hup Manufacturing Co Sdn Bhd v. Unitata Bhd* [1994] 3 CLJ 338 at p. 340; [1994] 2 MLJ 51, at p. 54, where it was held:

> According to *Chandris* case, the power of an arbitrator to award interest was *derived from the submission to him which impliedly gave him power to decide all matters of difference according to existing law of contract, exercising every right and discretionary remedy given to a court of law*. The court decided that the arbitrator had the power to award interest.
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> In the present case, the parties have agreed in the arbitration clause in the contract … that the construction, validity and performance be governed by Malaysian law. *Under s. 11 of the Civil Law Act 1956, the court has the*

> *discretionary power to award interest for the recovery of any debt or damages. See Evergrip Prestressing Sdn Bhd v. Ken Construction & Trading Sdn Bhd. In my view, the arbitrator in the present case has the same power as that of the court to award interest at such rate as he thinks fit*. Since it was within the discretionary power of the arbitrator to award interest in this case, the court would not interfere with the exercise of his discretionary power. (emphasis added)

[21] The same conclusion on the power of an arbitrator to grant pre-award interest was reached by Faiza Tamby Chik J in *Raja Lope & Tan Co v. Malayan Flour Mills Bhd* [2000] 6 CLJ 194; [2000] 6 MLJ 228, p. 238-239 and Raus Sharif J (as the PCA then was) in *Shamelin Holdings Sdn Bhd v. Mohd Anhar Ahmad* [2006] 8 CLJ 622; [2006] 6 MLJ 135, pp. 140-141 and as stated in the Court of Appeal in *Leong Kum Whay v. QBE Insurance (M) Sdn Bhd & Ors* [2006] 1 CLJ 1; [2006] 1 MLJ 710.

[22] The position in Singapore is exemplified by the case of *Ahong Construction (S) Pte Ltd v. United Boulevard Pte Ltd* [1995] 1 SLR 548 (pp. 556 to 557), where Lai Kew Chai J held as follows:

> With regard to the specific exercise of awarding interest in arbitration, *it is the law that generally interest should be awarded on a successful claim. An arbitrator who awards a sum of money but fails to award interest to compensate the successful claimant accordingly has prima facie misconducted himself* in the technical sense of the word: *Panchaud Freres SA v. Pagnan and Fratelli* [1974] 1 Lloyd' at p 394. Lord Denning MR (as he then was) said: *"[i]n a commercial transaction if the plaintiff has been out of his money for a period, the usual order is that the defendant should pay interest for the time for which the sum has been outstanding. No exception should be made except for a good reason. An arbitrator may decline to award any interest or award interest at a lower rate or for a shorter period but he must have reasonable grounds for doing so and he should set out these reasonable grounds in his award*". (emphasis added)

[23] In the event that an arbitration under the Arbitration Act 2005 is such that the arbitral tribunal does not have the power to award pre-award interest, Malaysia would be out of sync with other countries that apply the UNCITRAL Model Law, and more so with respect to International Arbitration. As stated in the explanatory note to the Arbitration Bill 2005, one of the avowed aims of the legislation is to encourage international uniformity in the arbitration regime under the UNCITRAL Model Law dated 21 June 1985.

[24] Jurisdictions in England, Australia, India and Singapore allow an arbitral tribunal to award pre-award interest as they have understood that the arbitral tribunal derives its powers not from the arbitration legislation but from the submission to the tribunal which clothed the tribunal with the implied powers to award interest. It follows that if the particular arbitration statute is not the source of the arbitral tribunal's power to award interest, then it does not quite matter if the arbitration statute is silent on pre-award interest for so long as it does not prohibit the award of pre-award interest.

A The award of pre-award interest would also fall within "usages of the trade applicable to the transaction" as envisages under s. 30(5) of the Arbitration Act 2005. The attractiveness of having Malaysia as the seat of arbitration would also be adversely affected if there can be no award of pre-award interest in a dispute that comes before it for arbitration.

B **[25]** It may also be argued that Parliament is presumed to know the law at any time it exercises its legislative authority upon a subject as was highlighted by the Court of Appeal in *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng* [1995] 3 CLJ 520; [1995] 1 MLJ 719 at 754. It is a very persuasive argument that Parliament is presumed to have known the law relating to an arbitral C tribunal's power and its jurisdiction to grant pre-award interest when enacting the Arbitration Act 2005. As a corollary, a statute is not to be taken as effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion. Such was the principle laid down by the Federal Court in *Malayan Banking Bhd v. Chairman Sarawak Housing* D *Developers' Association* [2014] 6 CLJ 409 at p. 418; [2014] 5 MLJ 169 at p. 178:

> [23] If the Act wishes to take away that right, words must be used that point unmistakably to that conclusion (*National Assistance Board v. Wilkinson* [1952] 2 QB 648). Devlin J in clear terms said:
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> > It is a well-established principle of construction that *a statute is not to be taken to effecting a fundamental alteration in the general law unless it uses words that point unmistakably to that conclusion* ... it is another principle of statutory interpretation that the court leans against an interpretation which produces unjust and arbitrary consequences. (emphasis added)

F **[26]** Section 33(6) of the Arbitration Act 2005 merely spells out the arbitral tribunal's power to grant post-award interest and its discretion in determining the rate. It says nothing on pre-award interest and it must have intended not to effect any fundamental alteration of that general law that an arbitrator has G power and jurisdiction to award pre-award interest. Indeed it can be said that s. 33(6) merely seeks to make it clear that an award may include post-award interest unless the arbitration agreement otherwise provides, unlike the previous position under s. 21 of the Arbitration Act 1952 where it is a case where unless the award otherwise directs, interest shall run from the date of the award at the same rate as a judgment debt. It appears that there is then H no justification for concluding that the converse is true in that pre-award interest is prohibited merely because s. 33(6) of the Arbitration Act 2005 is silent on it when it speaks clearly of when post-award interest may be made.

[27] However for the time being, the position of the law on pre-award I interest is as declared by the Court of Appeal in the *Far East Holdings*' (*supra*) case. Irrespective of my personal predilection and preference, the position of the law on pre-award interest as may be awarded by an arbitrator is as

propounded authoritatively by the Court of Appeal in the *Far East Holdings*' case (*supra*). To put it pointedly and plainly, an arbitrator has no jurisdiction to award pre-award interest but only post-award interest if provided for in the arbitration agreement.

[28] The law will have the opportunity to develop as the cases from which the principle is derived, go through to the apex court. In the meanwhile, the doctrine of *stare decisis* or binding precedent, applies to the High Court.

[29] Both judicial deference and discipline would demand of a High Court to follow the decision of a Court of Appeal on a point of law already decided. Whilst one may be at liberty to state the persuasive arguments to the contrary, one is not at liberty to disregard an authoritative pronouncement of the law of a court higher up in hierarchy. The following reminder of the Federal Court in *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 113 would resonate with all who respect the rules of binding precedent:

> [45] ... In order to appreciate the importance of adhering to the doctrine of *stare decisis* useful references may be made to *Cassell & Co Ltd v. Broome & Anor* [1972] 1 All ER 801 where Lord Hailsham said at p 809:
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> > The fact is, and I hope it will never be necessary to say so again, that, in the hierarchical system of courts which exists in this country, it is necessary for each lower tier, including the Court of Appeal, to accept loyally the decisions of the higher tiers. Where decisions manifestly conflict, the decision in *Young v. Bristol Aeroplane Co Ltd* [1944] 2 All ER 293 offers guidance to each tier in matters affecting its own decisions. It does not entitle it to question considered decisions in the upper tiers with the same freedom. Even this House, since it has taken freedom to review its own decisions, will do so cautiously. That this is so is apparent from the terms of the declaration of 1966 itself where Lord Gardiner LC said:
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> > > Their Lordships regard the use of precedent as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as a basis for orderly development of legal rules.

[30] Ever so often, an admonishment along the lines spelt out in *Periasamy Sinnappan v. Public Prosecutor* [1996] 3 CLJ 187 at pp. 213-214; [1996] 2 MLJ 557 at p. 582 has been repeated to rein in respect for the authority of a higher court:

> Lastly, the learned appellate judge did not sufficiently address his mind to the decision in *Khoo Hi Chiang*. We find the cavalier fashion in which he approached the judgment of a five-member bench of the Supreme

A Court in a case which was an authority binding upon him to be quite appalling. We are convinced that the learned appellate judge ought not to have brushed it aside as he did.

> We may add that it does not augur well for judicial discipline when a High Court Judge treats the decision of the Supreme Court with little or no respect in disobedience to the well-entrenched doctrine of *stare decisis*. We trust that the occasion will never arise again when we have to remind High Court judges that they are bound by all judgments of this court and of the Federal Court and **they must, despite any misgivings a judge may entertain as to the correctness of a particular judgment of either court, apply the law as stated therein**. (emphasis added)

Pronouncement

[31] For the reasons given above, this court was constrained to vary the award by setting aside the pre-award interest only pursuant to an application under s. 42 of the Arbitration Act 2005 such that interest awarded should run at the rate of 8% per annum from the date of award ie, 28 October 2015 to date of realisation instead of from 16 May 2012. The rest of the award is upheld and remains intact.

Each party shall bear its own costs.